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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID ALLEN KESLER,

Defendant and Appellant.

F077525

(Super. Ct. No. BF170792A)

OPINION

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. Brian M. McNamara, Judge.

John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Detjen, Acting P.J., Peña, J. and DeSantos, J.

Appellant David Allen Kesler pled no contest to stalking (Pen. Code,[1] § 646.9, subd. (b); count 1) and violation of a restraining order (§ 273.6, subd. (a); count 2), a misdemeanor.

On appeal, Kesler contends the court abused its discretion when it denied his motion to withdraw his plea. We affirm.

FACTS

Kesler was in a dating relationship with Veronica Ellis for a year before she ended it in 2015 because he became obsessed with her. On January 1, 2016, she obtained a domestic violence restraining order against Kesler that included her sister as a protected person. Ellis subsequently contacted the Bakersfield Police Department approximately nine times to report that Kesler violated the order by conduct that included showing up at her residence and by leaving her numerous voice mail messages insisting she contact him.

On November 29, 2017, Kesler showed up at Ellis's house. When her sister told him to leave, he became extremely angry and broke two Christmas lawn decorations. Kesler then called Ellis and left a voice mail message telling her to answer her phone and warning her she had better call him back. Kesler was arrested on December 30, 2017.

On February 6, 2018, the Kern County District Attorney filed an information charging Kesler with the two counts to which he pled.

On March 29, 2018, while represented by appointed counsel Alexandria Blythe,[2] Kesler entered his plea in this matter pursuant to an indicated sentence by the court of three years' felony probation with a maximum of one year in custody. Prior to entering his plea, Kesler initialed the pertinent items on the form including one that stated: "I have had enough time to speak with my attorney regarding the strengths of the case

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1 All further statutory references are to the Penal Code.

2 Blythe began representing Kesler in mid-February, after the preliminary hearing.

against me; any possible defenses that I may have; and the possible consequences of entering this plea." He also signed a declaration that stated he had read, understood, and initialed the items on the form and that everything on the form was true and correct.

While taking Kesler's plea, the court stated the terms of the indicated sentence and asked Kesler if he wanted to proceed; Kesler responded affirmatively. The court then told Kesler: "… and again if you have any questions, you have an attorney present with you. Please turn to that attorney at any time. It won't upset the court. Do you understand me?" Kesler replied that he did. Kesler also acknowledged that he initialed and signed the change of plea form. Before actually taking his plea, the court asked Kesler if had any questions about his rights and he replied that he did not.

On April 26, 2018, after the court granted Kesler's request to substitute retained counsel for appointed counsel, retained counsel informed the court that Kesler wanted to withdraw his plea and the court continued the matter.

On April 30, 2018, retained counsel filed a motion to withdraw plea on Kesler's behalf that, in pertinent part, alleged that Kesler had some important questions he needed answered and that he did not have sufficient time to speak with appointed counsel Blythe before entering a plea.

On May 10, 2018, during a hearing on the motion, Kesler testified that two weeks before he entered his plea, he spoke to Blythe for only five to ten minutes. However, he recalled only asking her to try to get him released on his own recognizance or to try to have his bail reduced. After she left, he thought about other things. He later attempted to call her office several times, but most of his calls did not get through because the phone system's answering machine would connect the call, but hang up. During a call that got through, he again asked Blythe about getting his bail reduced. Blythe told him that if she asked for a reduction in bail it would probably be increased and Kesler responded that he still wanted to ask. However, they spoke only briefly, and he did not finish his conversation with her because the phones "canceled out." Kesler had some unanswered

questions about his case and he wanted to get his bail reduced, so in two letters to Blythe, and once on the phone, he asked Blythe to come visit him in custody. A few weeks before he entered his plea, Blythe visited Kesler in jail.

Kesler further testified that he received some incorrect advice that he could continue fighting his case after entering a plea. However, he never had an opportunity to ask Blythe about that.

Kesler did not tell the judge that he needed more time to talk with his attorney because he did not feel like he had enough information, he made a poor judgment at the time, and he was not thinking of his future, e.g., that with a felony conviction he would not be able to continue his career. If he had more time to talk to Blythe, he "could have asked more questions and discussed [his case] a lot more in depth."

On cross examination, Kesler testified that he spoke to many attorneys and other people trying to get legal counsel and that he relied on the advice of one attorney, who did not represent him, in accepting the indicated sentence. Kesler acknowledged that since mid-February Blythe had spoken to him on the phone once, visited him in custody once, and spoken with him on the day he entered his plea. Kesler also acknowledged telling the court that he went over the change of plea form with Blythe, that he understood he could ask his attorney questions while the court took his plea, and that he did not ask the court for more time.

On the day he entered his plea, Blythe explained to him that there was an offer of three years' probation with a maximum of one year in custody. The offer sounded really good to Kesler because he was tired of being incarcerated and just wanted to get out, so he decided to enter a plea in order to get out of custody. However, he did not realize a three-year felony probation would place a felony on his record. He just wanted to take what he could and get on with his life. Then someone mentioned that it was easier to fight a case out of custody because he did not have limited use of a phone and limited information. However, he realized he was admitting he committed the charged crimes in

order to get out. Since entering his plea, the only thing that changed was that he now realized it would hurt his career.

On redirect examination, Kesler testified that when he spoke with other attorneys he was told that that his offense was a wobbler and that it could be reduced to a misdemeanor. When he said that he thought he could fight the case if he got out of jail, he meant that he thought he could get the charge reduced to a misdemeanor. He also thought that he could speak more freely with his attorney if he had been out of custody. Kesler did not recall if he spoke with Blythe about having the charge reduced to a misdemeanor, but he was pretty sure he mentioned it to her. However, he did not have a private conversation with Blythe at the jail after he spoke with the other attorneys.

Retained counsel argued that the inability of Kesler to post bail resulted in Kesler not having a meaningful opportunity to discuss his case with Blythe. This put Kesler in the predicament of having to get legal advice any way he could and being told that his offense was a wobbler. Further, his inability to meet with an attorney who could explain his case resulted in Kesler entering his plea under the mistaken belief that he could get out of custody and then have the matter reduced to a misdemeanor. Kesler could have asked the court for more time to speak with Blythe, but he had been unsuccessful in having Blythe visit him at the jail and he was not given any assurances that she would visit him and answer his questions. Thus, according to retained counsel, Kesler did not enter his plea knowingly or intelligently because he was deprived of the effective assistance of counsel to the extent that he did not have the opportunity to sit down with his attorney and have all his questions answered before entering his plea.

In ruling on Kesler's motion, the court recounted the communications Kesler had with Blythe prior to Kesler entering a plea. It also noted that before it took his plea, Kesler told the court that he did not have any questions. The court then denied the motion, concluding that the motivation behind it was "buyer's remorse in a sense" and

that Kesler had not met his burden of showing by clear and convincing evidence that he entered his plea by mistake, ignorance, or duress.

DISCUSSION

Kesler contends he did not enter his plea knowingly and intelligently because he did not have adequate time to consult his attorney and he mistakenly believed that he could continue to fight the charges once he was released from custody. Thus, according to Kesler, the court abused its discretion when it denied his motion to withdraw plea because he did not enter his plea knowingly and intelligently. He also contends the court erred by applying the clear and convincing standard in ruling on his motion rather that the preponderance of the evidence standard. We reject these contentions.

The Court Did Not Abuse its Discretion When it Denied Kesler's Motion

> "Section 1018 provides, in part: 'On application of the defendant at any time before judgment …, the court may, … for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted. … This section shall be liberally construed to effect these objects and to promote justice.' The defendant has the burden to show, by clear and convincing evidence, that there is good cause for withdrawal of his or her guilty plea. [Citations.] 'A plea may not be withdrawn simply because the defendant has changed his [or her] mind.' [Citation.] The decision to grant or deny a motion to withdraw a guilty plea is left to the sound discretion of the trial court. [Citations.] 'A denial of the motion will not be disturbed on appeal absent a showing the court has abused its discretion.' [Citations.] 'Moreover, a reviewing court must adopt the trial court's factual findings if substantial evidence supports them.' [Citation.]
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> "To establish good cause to withdraw a guilty plea, the defendant must show by clear and convincing evidence that he or she was operating under mistake, ignorance, or any other factor overcoming the exercise of his or her free judgment, including inadvertence, fraud, or duress. [Citation.] The defendant must also show prejudice in that he or she would not have accepted the plea bargain had it not been for the mistake." (*People v. Breslin* (2012) 205 Cal.App.4th 1409, 1415-1416.)

Blythe represented Kesler after the preliminary hearing. Between that hearing and when he entered his plea, Kesler wrote two letters to her, spoke with her on the phone at

least once, and met with her at the jail once. On the day he entered his plea, Kesler went over the change of plea form with Blythe. On the form, Kesler placed his initials next to a statement in which he acknowledged that he had enough time to speak with his attorney and that he had gone over his case with her, including any possible defenses and the consequences of his plea. He also signed a statement on the change of plea form acknowledging that he read, understood, and initialed the items on the form and that everything on the form was true and correct. Even though the court told him he could interrupt the change of plea proceeding to ask his counsel questions, Kesler did not. When the court asked Kesler right before taking his plea if he had any questions, he responded that he did not. Thus, the record shows that Kesler had plenty of opportunities to ask defense counsel questions, including on the day he entered his plea.

Further, Kesler did not explain how being released from custody would have facilitated his ability to get his charge reduced to a misdemeanor. He also admitted that his main concern was to get out of custody and that he exercised bad judgment in entering his plea. Thus the record amply supports the court's finding that Kesler was motivated to withdraw his plea by "buyer's remorse."

Moreover, Kesler did not contend, or attempt to prove, that he would not have accepted the indicated sentence but for his alleged mistake and lack of access to counsel. Thus, Kessler also failed to show prejudice. (*People v. Breslin*, *supra*, 205 Cal.App.4th at p. 1416.)

Kesler cites *People v. McGarvy* (1943) 61 Cal.App.2d 557 (*McGarvy*), to support his claim that he did not enter his plea knowingly and intelligently because he did not have sufficient time to consult with defense counsel. !(AOB: 11-12.)! In *McGarvy*, at a court hearing two days after being arrested on one count each of murder and voluntary manslaughter, an attorney spoke to the defendant at the request of the prosecutor. After speaking with the attorney only 20 to 30 minutes, the defendant pled guilty to the manslaughter count. (*Id*. at p. 559.)

During the defendant's pre-plea incarceration, his requests to talk to family members or an attorney were denied. The morning after his arrest, the defendant's sister made arrangements with an attorney to represent him. However, when she went to the jail to tell the defendant she had retained counsel for him and that counsel would see him the next morning, she was refused admission to see him. The next day, retained counsel arrived at the court after the case against the defendant had concluded. (*McGarvy*, *supra*, 61 Cal.App. 2d at p. 559.) Two days later, the defendant filed a motion to withdraw plea that the trial court denied. (*Id*. at pp. 558-559.)

The *McGarvy* court noted that "there was undue haste in the entire disposition of the case." (*McGarvy*, *supra*, 61 Cal.App.2d at p. 561.) Additionally, in finding that the trial court abused its discretion and reversing its order, the *McGarvy* court concluded that the law had not been "complied with by the token appearance of an attorney brought into the case by the district attorney" and that "the defendant's right to be represented by counsel of his own choice was invaded[.]" (*Id*. at p. 565.)

McGarvy is easily distinguishable because in reversing the trial court's order, the *McGarvy* court relied primarily on the denial to the defendant of his right to counsel of his choice, an issue not present here. Additionally, unlike the defendant in *McGarvy*, Kesler faced much less serious, and presumably less complicated charges, Kesler had plenty of time to consider his options because he was in custody several months before he pled, he met or communicated with two different public defenders numerous times, just prior to entering his plea he acknowledged verbally and/or in writing that he had plenty of time to speak with his defense counsel and did not have any questions, and the court provided him with the opportunity to speak with defense counsel even while it took his plea. Thus, we conclude that the court did not abuse its discretion when it denied Kesler's motion to withdraw plea.

The Court Used the Correct Standard of Proof in Denying Kesler's Motion

In *People v. Nance* (1991) 1 Cal.App.4th 1453 (*Nance*), the appellate court held that the standard of proof for a defendant to show good cause for withdrawing his plea is clear and convincing evidence. (*Id*. at p. 1457.) In reaching this conclusion, the court cited a plethora of cases for this proposition, including the Supreme Court's decisions in *People v. Wharton* (1991) 53 Cal.3d 522, 585, *People v. Cruz* (1974) 12 Cal.3d 562, 566, and *In re Dennis M.* (1969) 70 Cal.2d 444, 457, fn. 10. (*Nance*, at p. 1456.)

However, in a concurring opinion, Justice Timlin, while concurring with the result, agreed with the appellant that the appropriate standard of proof for showing good cause to withdraw a defendant's plea is the preponderance of the evidence standard. (*Nance*, *supra*, 1 Cal.App.4th at p. 1458.) In so doing, Justice Timlin described the Supreme Court's contrary holding in the three cases cited above as dicta. (*Id*. at pp. 1462-1464.) He also discussed several reasons why he believed the correct burden of proof was a preponderance of the evidence. (*Id*. at pp. 1466-1470.)

Kesler relies on Justice Timlin's concurring opinion in *Nance* to contend that the preponderance of evidence standard is the appropriate standard of proof for ruling on a defendant's motion to withdraw plea. Thus, according to Kesler, the trial court erred here because it used the clear and convincing evidence standard in ruling on his motion. There is no merit to this contention.

In rejecting Justice Timlin's arguments, the majority in *Nance* stated: "[T]he California Supreme Court has embraced [that standard] in three opinions. Indeed, this burden of proof is so entrenched in the case law of California that it has taken on the character of bright line law. We stand on the principle of stare decisis. If this burden of proof was erroneously adopted, we leave it to the Supreme Court to abandon it and state a new one." (*Nance*, *supra*, 1 Cal.App.4th at pp. 1457-1458.) We agree with the majority in *Nance* and conclude that court applied the correct standard of "clear and convincing evidence" in ruling on Kesler's motion.

DISPOSITION

The judgment is affirmed.